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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

JEFFREY MILLER and ALLYSON MILLER, Appellants, v. KITTY L. WAYNE, Appellee.	2 CA-CV 2010-0093 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20086086

Honorable Carmine Cornelio, Judge

APPEAL DISMISSED

Thompson Krone, P.L.C.
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E C K E R S T R O M, Judge.

¶1 Appellants Jeffrey and Allyson Miller appeal a superior court judgment entered pursuant to A.R.S. § 11-807(D) on January 19, 2010.[1] The judgment affirmed certain zoning variances granted by the Pima County Board of Adjustment to the appellee, Kitty Wayne. The Millers also appeal the court's order denying their motion to amend or alter the judgment and requesting a new trial. In discharging our duty to examine our own jurisdiction, we have determined we lack jurisdiction to consider the appeal and therefore order it dismissed. *See Robinson v. Kay*, 225 Ariz. 191, ¶ 4, 236 P.3d 418, 419 (App. 2010).

¶2 When the Millers filed their appeal to the superior court, § 11-807(D) provided: "Any person aggrieved in any manner by an action of a board of adjustment may within thirty days appeal to the superior court, and the matter shall be heard de novo."[2] The Millers claim this court has jurisdiction over their present appeal pursuant to A.R.S. § 12-2101(B), which authorizes appeals to this court "[f]rom a final judgment entered in an action or special proceeding commenced in a superior court, or brought into a superior court from any other court," except certain forcible entry and detainer actions. We disagree.

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[1]The version of the statute then in effect and relevant to this appeal is found in 2002 Ariz. Sess. Laws, ch. 120, § 1. All citations to § 11-807 refer to this version of the statute, except as otherwise indicated.

[2]Later amendments to § 11-807(B) and A.R.S. § 11-808(G), which made judicial review of a board of adjustment's final decisions subject to the Judicial Review of Administrative Decisions Act, do not apply to this case, as they took effect months after the superior court entered its judgment and denied the Millers' post-judgment motion. *See* 2010 Ariz. Sess. Laws, ch. 319, §§ 2-3; *see also* Ariz. Const. art. IV, pt. 1, § 1(3) (new laws generally not operative until ninety days after close of legislative session).

¶3 The Millers' appeal to the superior court under § 11-807(D) was neither "commenced" in the superior court nor "brought into [the] superior court from . . . [an]other court" under the terms of § 12-2101(B). Although the superior court's hearing was undertaken "de novo" pursuant to § 11-807(D), it nonetheless was an "appeal" of a final decision of the Pima County Board of Adjustment, with the issues to be decided necessarily limited. *See Sw. Soil Remediation, Inc. v. City of Tucson*, 201 Ariz. 438, ¶ 12, 36 P.3d 1208, 1212 (App. 2001) ("The doctrine of exhaustion of administrative remedies usually applies when a statute establishes an administrative review procedure and 'determines *when* judicial review is available.'"), *quoting Original Apartment Movers, Inc. v. Waddell*, 179 Ariz. 419, 420, 880 P.2d 639, 640 (App. 1993) (emphasis in *Waddell*). Thus, this special proceeding did not originate in the superior court. Similarly, the proceeding was not brought to the superior court from another court; rather, it was brought to the superior court from the board of adjustment. *Cf.* 2001 Ariz. Sess. Laws, ch. 43, § 1 (specifying appeals to superior court from board of adjustment under former § 11-807(D) "shall be heard de novo as appeals from courts of justices of the peace"). Accordingly, § 12-2101(B) does not authorize the present appeal.

¶4 An appellant is required to state the jurisdictional basis for an appeal in his or her opening brief. Ariz. R. Civ. App. P. 13(a)(3). The Millers do not contend any other provision of § 12-2101 allows this appeal, nor have they requested that this court review the superior court's judgment by special action.

¶5 "In the civil context, the right to appeal is not absolute but exists only by statute." *S. Cal. Edison Co. v. Peabody W. Coal Co.*, 194 Ariz. 47, ¶ 16, 977 P.2d 769,

774 (1999). "If there is no statute which provides that a judgment or order is appealable, the appellate courts of this state do not have jurisdiction to consider the merits of the question raised on appeal." *Musa v. Adrian*, 130 Ariz. 311, 312, 636 P.2d 89, 90 (1981). We have determined § 12-2101 does not confer jurisdiction on this court. We therefore order the appeal dismissed.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge